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Administrative Law—Judicial Review of Dismissal of Police Officer

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the instant case seem to discern this danger, and would hold that the lower court abused its discretion in allowing the *habeas corpus* writ.

JUDICIAL REVIEW OF DISMISSAL OF POLICE OFFICER

A policeman of the City of New York may not be dismissed from the force without a hearing before the Commissioner of Police or his deputy.[10] Such a determination is reviewable by the courts in an Article 78 proceeding when "any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner."[11]

In *Grottano v. Kennedy*[12] petitioner's dismissal from the New York City police force was based on two sets of charges of violation of the department rules and regulations. The first set were charges connected with the running of an escort service for local merchants. A hearing on these charges was scheduled for June 4th but was adjourned until June 27th so that the Corporation Counsel could serve a bill of particulars on petitioner, which bill was not served until the morning of June 27th. When on that date petitioner refused to go to trial, against the Commissioner's orders, an additional set of charges for insubordination were preferred for this refusal. On July 11th a hearing was convened on both sets of charges. On advise of counsel defendant refused to participate unless an earlier set of quasi-criminal charges of being a "finger man" in a hold-up were heard first. On refusal of the Commissioner to do so, the petitioner was tried *in absentia*. In the period between the first hearing date and the second, petitioner had applied for retirement to be effective August 2nd. The petitioner was found guilty on the charges and was dismissed from the police force before his pension could take effect.

The Court of Appeals upheld the trial *in absentia* on the escort charges because the petitioner had no right to have the quasi-criminal charges heard first. However, it reversed as to the charges of insubordination for refusal to go to trial on June 27th. The Court gave two grounds for this reversal. First, the Commissioner, when presiding over a hearing such as this, is functioning as a judge, not as the defendant's superior officer and for that reason, refusal to obey his orders is not insubordination. Secondly, it was an abuse of discretion for the Commissioner not to allow an adjournment of the June 27th hearing.

A police officer must yield obedience to the rules and regulations of the department; however, if he disobeys them he is entitled to a fair hearing.[13] One requirement for a fair hearing is that the accused be allowed a reasonable adjournment if necessary for his counsel to represent him.[14] Whether a denial of an adjournment is reasonable, depends on the case to be prepared and on

10. ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 434(a) 14.0.
11. N.Y. CIV. PRAC. ACT § 1296.
12. 5 N.Y.2d 381, 184 N.Y.S.2d 648 (1959).
13. Shea v. Valentine, 249 App. Div. 556, 292 N.Y. Supp. 906 (1st Dep't 1937).
14. Bush v. Beckman, 283 App. Div. 1070, 131 N.Y.S.2d 297 (2d Dep't 1954).

the surrounding circumstances such as a retirement about to take effect.[15] In *Evans v. Monaghan* defendants refused to withdraw their pending retirement applications and the Court upheld expedition of the hearing in order to prevent their retirement from taking effect, thus making the hearing a nullity. The present case applies the same principle and does not allow an accused to thwart the purpose of the hearing by refusing to participate in it.

APPEAL OF DISMISSAL UNDER FEINBERG LAW

The Feinberg Law is New York's statutory provision for eliminating subversive teaching personnel from the public school system.[16] School officials in New York City attempted to enforce this law by demanding that teachers reveal names of co-workers who are or were members of the Communist Party. The officials dismissed or suspended those refusing to name other teachers.

The reprimanded teachers appealed to the Commissioner of Education. He decided that officials might not suspend or dismiss personnel for their refusal to inform on their co-workers.

Pursuant to Section 1283 of the Civil Practice Act, the school officials initiated court proceedings to review the Commissioner's determination. In affirming the lower courts' findings the Court of Appeals, by a six to one decision (Burke, J. dissenting) in *Board of Education of City of New York v. Allen*[17] held that the commissioner's ruling was within his power and was not arbitrary.

Section 310 of the New York Education Law, referring to appeals to the commissioner, states that "his decision . . . shall be final and conclusive, and not subject to question or review in any place or court whatever." In interpreting Section 310 the Court of Appeals has said that "decisions by the commissioner of education are final unless purely arbitrary."[18]

Without passing on the correctness of the Commissioner's determination in the instant case, the Court found reasonable grounds upon which his ruling could have been based. Among these grounds was the Commissioner's assertion that this type of interrogation engenders an atmosphere of suspicion and uneasiness among the educators, to the detriment of the students.

The argument that enforcement of the Feinberg Law was prevented by the Commissioner's ruling was refuted. The Court admitted that the means used by the officials were the easiest and most efficient, but pointed out that it was not the only reasonable means available. Unlike the courts, the Commissioner is empowered to substitute his judgment for that of the officers whose action he is reviewing. He could overrule one method without having to find that it was totally unreasonable. This, the Court felt, was the import of Section 310.

Judge Burke in his dissent felt that the commissioner did not have the

15. 306 N.Y. 324, 118 N.E.2d 452 (1954).
16. N.Y. EDUCATION LAW § 310.
17. 6 N.Y.2d 127, 188 N.Y.S.2d 515 (1959).
18. Ross v. Wilson, 308 N.Y. 605, 127 N.E.2d 697 (1955).